No. 12,775

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LLOYD A. FRY ROOFING COMPANY; VOLNEY FELT MILLS, INC.; ST. JOHNS MOTOR EXPRESS COMPANY; BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; and MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL,
Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR BUILDING AND CONSTRUCTION TRADES COUNCIL OF PORTLAND AND VICINITY, AFL; and MILLWRIGHTS AND MACHINE ERECTORS UNION, LOCAL No. 1857, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL

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AUTHORITIES CITED

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JURISDICTION

The statement of jurisdiction contained in the National Labor Relations Board's brief is correct and this

Court has jurisdiction pursuant to Section 10 (e) of the National Labor Relations Act, as amended 29 U.S.C.A. Section 160.

STATEMENT OF THE CASE

We believe that in order to fully present the issues involved in this proceeding, a more detailed statement than that contained in the N.L.R.B.'s brief is in order. Lloyd A. Fry Roofing Company (hereinafter referred to as Fry) and its subsidiary, Volney Felt Mills, Inc. (hereinafter referred to as Volney) were engaged in the manufacture, distribution and sale of roofing materials. They had plants in various states and did a substantial interstate business (R. 57-59). Sometime early in 1947, Fry and Volney acquired a Felt machine and shipped it to Portland, Oregon (R. 62, 63). After the machine had arrived, they began the construction of a building within which to house the machine (R. 62). A Chicago firm, Campbell-Lowrie-Lautermilch, was the building contractor for Fry and Volney (R. 149, 41-42). Prior to this time, Fry imported from other states all its felt for the making of roofing and continued to do so until this plant went into operation early in 1948. After this plant was in operation, they no longer had to import felt.

St. Johns Motor Express Company (hereinafter referred to as St. Johns) is a corporation in Portland, Oregon, engaged in the interstate transfer business. They also render a service of installing industrial machinery in Oregon and other states (R. 90).

In February, 1947, the Lautermilch firm and these respondents entered into a closed shop agreement whereby all the work performed on this particular job was to be done by various locals affiliated with these respondents (R. 177-179). There were also discussions between agents of these respondents and Mr. Lautermilch concerning whether the contract was also to include the installation of the machinery. As a result of these discussions, Mr. Lautermilch wrote a letter to these respondents assuring them that the owners had assured him, that regardless of who installed the machinery, it would be done on a "basis fair" to these respondents (R. 39, 121-122, 160-161).

After Lautermilch had begun construction of the building, employing exclusively members of these respondent unions, pursuant to his contract, a sub-contract was let to St. Johns for the installation of the machinery. Officers of Fry and Volney informed St. Johns that installation of the machinery was to be done by "A. F. of L. Machinists Local 63" (R. 45, 99). The contract of St. Johns was on a cost-plus basis (R. 100, 150-151).

St. Johns called Machinists Local 63 which, at that time, still had offices in the A. F. of L. Labor Temple, and requested four machinists be sent down from the Union Hall (R. 113). The Union, in accordance with the request, called four of its members and had them report with clearance slips. The Machinists' hall is operated as a hiring hall to dispatch members of Local 63 and to give preference in employment to members

of Local 63 (R. 74-76). The Machinists Union was not a member of the A. F. of L. and had withdrawn their affiliation some two years previously (R. 137).

After the machinists had been on the job a few days, these respondents became advised of this fact. These respondents immediately called upon Fry, Volney and St. Johns and insisted that they be replaced by members of these respondent unions (R. 90). Attention was called to the contract and letter of Mr. Lautermilch. A letter was written to St. Johns requesting that they appear before the Building Trades Council "to state their version of the controversy" and notifying them that action would be taken on the Millwrights' request to put them on the Unfair List (R. 85).

It is conceded that these respondents made it clear to Fry, Volney and St. Johns that serious economic reprisals *might* be taken against them if the contract was not recognized. Fry and Volney then directed St. Johns to replace the machinists with members of these respondent unions, which was done. This was all done without any work stoppage, strike or picketing (R. 105-107, 111).

The machinists then petitioned the Board to cite Fry, Volney, St. Johns and these respondents for unfair labor practices. This was done and after hearing, the Board found that each of the respondents had been guilty of unfair labor practices and entered a cease and desist order. The Board also directed each respondent jointly and severally to "make whole" each of the six discharged machinists (R. 200-205).

POINTS RELIED UPON BY THESE RESPONDENTS

I. The operations of the respondent companies did not affect commerce.

1. The construction was essentially a local project.
2. The alleged unfair labor practice would have increased rather than decreased interstate commerce.

II. The discharge of the machinists was made pursuant to a valid contract.

1. The Agency Doctrine.
2. Board had consistently refused to assert jurisdiction over Building Trades under Wagner Act.
3. The discharges were not the result of threats or coercion.

III. The machinists were not entitled to any relief—Unclean Hands Doctrine.

1. The machinists were employed by means of the "hiring hall" in violation of the Taft-Hartley Act.

IV. The petition seeking an Order directing the posting of notices is moot.

1. The machinists are again members of the A.F.L.
2. The project has long since been completed without any work stoppage.

ARGUMENT

I.

The operations of the respondent companies did not affect commerce.

1. The construction project was essentially a local project.

It is conceded by these respondents that, when viewed separately, the business of each of the respondent companies, that is, Fry, Volney and St. Johns, an effect on interstate commerce is indicated. This was, however, a simple construction project, to-wit, the construction of a building and the installation of machinery therein. Not every labor dispute arises to such dignity that it impedes and obstructs interstate commerce although the employer may be engaged in what might be defined as interstate commerce. We admit the question is generally determined in each individual case on its own merits but where the effect is not close or substantial, then the project is essentially a local one. There is no evidence of any kind whatsoever in this record that indicates the construction of the building was in any way interstate in character.

The machine itself had long since arrived in the State of Oregon. The record is silent on whether or not materials going into the project were obtained outside the State. The very purpose of the construction was to decrease interstate commerce rather than increase it. There is nothing to indicate what the effect on com-

merce would have been if a work stoppage had occurred. Each of the respondent companies had a substantial interstate business. However, as far as Fry and Volney were concerned, their business went on as before and would have gone on regardless of this project. St. Johns no doubt had other projects but here too the record is silent. When viewed separately, this was one isolated construction project having no relation to interstate commerce. If it affected commerce at all, it was remote, indirect and inconsequential.

In this day of rapid communication and transportation, it is hard, and perhaps impossible, to imagine a business that does not in some way affect commerce. We admit it is not the amount that is controlling. Even though the interstate operation was small, it might have a great and direct effect on commerce, whereas, on the other hand, the interstate feature might be large but the effect on commerce inconsequential. The Petitioners in this case are content to point out the volume of each of the respondent companies' interstate business and ask this Court to conclude that from this volume alone, the effect on commerce was such as to justify the taking of jurisdiction. We contend and urge that Congress did not intend that the Administrative Agency should construe the law in this manner. The Board itself has consistently refused to assert jurisdiction over local businesses which might be considered nominally covered by the law on the grounds of policy. (See Brief of N.L.R.B. This Court #12412, Haleston Drug Stores, Inc. v. N.L. R.B., P. 45.)

2. The alleged unfair labor practice would have increased rather than decreased interstate commerce.

The purpose of the new plant was to manufacture the original felt in Oregon rather than import it from another state. Until the new plant went into operation, Fry continued to import felt and have it converted and manufactured in its roofing plant (R. 102-103). It is not contended that any interruption in the flow of such commerce was even threatened. The sooner the construction was completed the sooner the interruption in this flow of commerce. If the plant had never been erected, more commerce would have flowed than before, so in fact, the construction of the plant and the installation of the machinery actually interrupted interstate commerce. We have the actual reverse of the situation contended for by the Petitioners.

A close examination has been made of the authorities cited by the Petitioners to sustain jurisdiction. Suffice it to say that in each one the facts are materially different. It is clear that in each the effect on interstate commerce is apparent. The only evidence in this record of any possible effect on commerce is contained in the following cross examination of V. J. Eggleston, Office Manager for St. Johns:

> "Q. In your conversation that you had with Mr. Manash on Friday the 29th, you stated that some reference was made to what might happen to your operations—that is the St. Johns Motor Express operations—if the machinists were continued to be employed upon this Volney Felt Mill job. How did that conversation arise; I mean that portion of the conversation?

A. I believe I asked Mr. Manash what would happen and he told me.

Q. Would you mind repeating again the substance of what he told you?

A. As I recall, Mr. Manash says that the situation might develop into a situation wherein we would not be—our teamsters would not be permitted to deliver building materials, such as lumber and the like, to construction projects on which A. F. of L. carpenters were employed.

Q. Now if that contingency arose, it would materially affect your business?

A. Oh. definitely." (R. 90-91).

Therefore, we see that in the discussions, these respondents said there might be a possibility if the situation continued to develop of economic sanctions which would affect commerce. It was only a possibility which in fact never developed.

There is no evidence in the record which would warrant a finding that a labor disturbance at Fry and Volney's plant here in Portland in the construction project would have had any impact upon their operations in other states or even at the Portland plant. This is the same situation which faced the Court in the case of *N.L.R.B. vs. Shawnee Milling Co.,* 184 Fed. (2d) 57, 59.

In the case of *Mills vs. United Assn. of Journeymen, etc.,* 83 Fed. Supp. 240, 246, it was held that persons employed in purely local projects were not engaged in commerce or in producing goods for commerce within the meaning of the Taft-Hartley Act, and that, therefore, the Court was without jurisdiction.

See also *N.L.R.B. vs. Jones and Laughlin Steel Corp.,* 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352.

While the record is silent on the effect on commerce, assuming that an unfair labor practice was committed, we submit that if the record had been made on this question, it would have come within the de minimis maxim. See *Groneman, et al. vs. International Brotherhood of Elect. etc.,* 177 Fed. (2d) 995, 997-998. *N.L.R.B. vs. Fainblatt,* 306 U.S. 601, 607, 307 U.S. 609, 59 S. Ct. 668, 672, 83 L. Ed. 1014.

We, therefore, contend that there is no substantial evidence in the record indicating an effect on interstate commerce which would justify the petitioners in assuming jurisdiction of this controversy.

II.

The discharge of the machinists was made pursuant to a valid contract.

1. The Agency Doctrine.

As we have previously pointed out, Fry and Volney were desirous of having a building erected within which to house a felt making machine. This was not an enlargement of these companies' facilities as stated in petitioners' brief (P. 9) but was merely to manufacture raw felt to be used by Fry in making roofing material. Fry still made the same amount as before but did not any longer import the raw felt after the raw plant was in operation.

A contract was let for this construction to Campbell, Lowrie and Lautermilch Corp., a Chicago firm. Mr. Lautermilch entered into a *valid* closed shop contract

with these respondent unions. Mr. Lautermilch had told these respondents at an early meeting that he wasn't sure his firm would be handling the setting of the machinery. He told these respondents that he would take the matter up with Fry and Volney and let them know the outcome (R. 122-123). He then wrote the letter of March 7, 1947 advising these respondents that Fry and Volney had assured him regardless of who set the machinery, it would be done on a "fair basis" to these respondents (R. 160-161).

We do not believe that even the petitioners will contend that had Lautermilch done the setting of the machinery that these respondents would not have had a good and binding contract.

Assuming that Lautermilch did not have the authority to bind Fry and Volney, there is nothing to prevent Fry and Volney from ratifying and adopting this contract which had been made in their behalf. If Fry and Volney had decided to set the machinery themselves, and had adopted and ratified this agreement, is there anyone that can say these respondents did not have a good and binding contract?

We believe the record indicates that Fry had been consulted and had authorized Lautermilch to speak for him (R. 39). We submit, however, even if the authority was lacking, Fry and Volney could still ratify and adopt the contract made for them.

The law does not authorize the N.L.R.B. or the Courts to make collective bargaining contracts or to

prescribe what shall be written into them. *N.L.R.B. vs. Corsicana Cotton Mills,* 179 Fed. (2d) 234.

It has also been decided that a contract between the employer and the Union does not need to be in any particular form, or moreover, it does not even need to be reduced to writing as was said in the case of *N.L.R.B. vs. Scientific Nutrition Corp., et al.,* 9th C., 180 Fed. (2d) 447:

> "The Act, it is to be remembered, does not require contracts between employer and the Union to be in any particular form or that they be reduced to writing. . . . If the practice here were the result only of a mutual interpretation of the formal written document without more, the result would not be different. . . . There is, in short, no adequate reason for questioning the good faith of the management in acting on its understanding that a closed or Union shop was in effect."

Express or implied adoption of acts of another by one for whom the other assumes to be acting constitutes ratification or confirmation of those acts even if the agent had no authority to bind the principal. So, too, the affirmance of an agent's contract may be established by conduct of the purported principal manifesting its approval thereof. *First Stamford National Bank and Trust Co. vs. Pierce,* 293 N.Y.S. 75, 161 Misc. 756. *Marian vs. Peoples Pittsburgh Trust Co.,* 27 A. (2d) 549, 149 Pa. Super. 653.

Adoption is in legal effect the making of a contract as of the date of its adoption. 2 C.J.S. 1071, Sec. 34 (c).

Where a person accepts a contract without objection and avails himself of its provisions, he is bound.

Petitioners state, however, that because of the fact Fry and Volney let a contract to St. Johns for the setting of the machinery, these respondents have no status. We will now demonstrate how untenable such a contention is.

Mr. J. R. Baker was Chief Engineer for Volney and came to Portland and was in complete charge of the setting of the machinery. His principals had told him that in such installation, machinists Local Union 63 A. F. of L. was to be used (R. 45). Mr. Baker and Mr. B. B. Alexander, Fry and Volney's Portland Manager, then contacted St. Johns and, on a cost-plus basis, secured them to install the machinery. St. Johns was told that Local 63 A. F. of L. was to be used for said installation and this was agreed to by St. Johns (R. 45). It is undisputed that St. Johns was completely under the direction and control of Fry in all of their actions. This fact is admitted in the pleadings and the record fully supports it (R. 13, 17, 49, 87, 106). It is submitted that since Fry was bound by the contract, then its agent St. Johns was also bound. The maxim of adoption and ratification is equally applicable to St. Johns. What is finally compelling is that everyone recognized the contract as a binding one and attempted to abide by it. Where would there be better evidence to conclusively prove that such a contract did exist. Performance of a contract is the best evidence of its terms and the intention of the contracting parties.

2. The Board had consistently refused to assert jurisdiction over Building Trades under Wagner Act.

The Petitioners next contend that even if the contract was binding on the respondent companies, it was not enforceable because these respondents had not been designated as the collective bargaining representative. This contention is absurd when viewed in the light of the record and the petitioners' construction of the law at the time this contract was entered into.

It is to be remembered that the Taft-Hartley Act went into effect August 22, 1947, and by that act any contract valid prior to that date would be valid for at least a period of one year. Prior to the Act, the Petitioners had consistently refused to take jurisdiction of the Building Trades. See *Johns-Manville Corp.,* 61 N.L. R.B. 1.

The record discloses that these respondents at the time this contract was entered into had closed shop agreements in the entire area comprising almost 100 per cent of the entire State of Oregon (R. 135-136). Therefore, even if the petitioners had jurisdiction at that time, because of the fact that there was an area unit, these respondents, being the collective bargaining representative, having over 95 per cent of the members in this particular area, would have a majority of such members in the unit, and be perfectly justified in signing the closed shop contract.

You, therefore, have the absurd situation of the petitioners now saying there was no enforceable contract because these respondents had not been designated by

them as a proper bargaining representative; when had these respondents asked the petitioners to so designate them, the petitioners would have declined on the ground that they had no jurisdiction. In short, the petitioners have brought this action against these respondents, yet the petitioners would not have accepted jurisdiction in such a case.

3. The discharges were not the result of threats or coercion.

We believe that when the facts are pointed out clearly, it is plain that these respondents did not make threats or bring coercion which resulted in the discharge of the six machinists. The machinists' Local 63 had withdrawn their affiliation with the A. F. of L. some two years previous to the time of this dispute although they continued to occupy space in the A. F. of L. Labor Temple (R. 113, 136). All the hiring was done after August 22, 1947, the effective date of the Taft-Hartley Law. On either August 27th or 28th, after the machinists were hired, Mr. Manash, Secretary of the Building Trades Council, called Mr. Eggleston, an official of the St. Johns, and stated to him that the Building Trades Council had a contract for the installation of all the machinery in the plant under their contract between the Union and Fry and insisted that Fry and its agents, the St. Johns Co., live up to their contract and employ only members of union affiliated with the Building Trades Council (R. 125).

On Friday, August 29th, a meeting occurred between Mr. Johns, Agent for the Machinists, Mr. Manash and

Mr. Eggleston. At no time during this meeting did Mr. Manash state that he would take definite action against either St. Johns or Fry, and merely stated that if the matter was not cleared up they would be cited to appear before the Building Trades Council. At such time the whole matter could be threshed out, after which a decision would be made as to whether Fry was to be placed on the unfair list or not (R. 129). Mr. Eggleston even admits that no threats of any kind were made. Mr. Eggleston further states that the only thing said was Mr. Manash's statement that, after a thorough investigation and a thorough hearing, *if* St. Johns and/or Fry were placed on the unfair list, possibly some action *might* be taken (R. 91).

On September 2, 1947, a meeting was held between Mr. Johns and Mr. West, the International representative of the Machinists' Union, at which time, after Mr. Eggleston had consulted with his lawyer, Mr. Scudder, he informed Mr. Johns and Mr. West that millwrights would be employed on the job instead of machinists (R. 87-88). In short, the facts are that no action was ever taken or threatened to be taken, against either Fry or St. Johns by the Building Trades. St. Johns rather than appear and explain its position before the Board, acceded to the fact that it was the A. F. of L. which had the contract.

Further, it is also undisputed in this case that it was Fry which told St. Johns to discharge the machinists and hire members of the Millwrights Union. There was no coercion and in the second place the superior officer

of Fry, Mr. Alexander, stated definitely that the reason the machinists were discharged and the millwrights put on the job was not because of any alleged statements of the Building Trades Council's representatives, but because of the fact "they had the wrong union on the job." In other words, the Fry people, having found out their mistake—that they were hiring non-members of the A. F. of L. and were not in accordance with their contracts of February and March to which they were bound—discharged the men for this reason and not because of any alleged threats on the part of the Building Trades Council.

Because of the fact that the testimony is so vital, we will quote the testimony at length:

Cross-examination of Mr. Alexander (local manager of the Fry Roofing Company)

"Q. Was that the thing that decided you then to direct that the machinists be taken off the job and the millwrights put on?

A. *The thing that decided me was the fact that we found that we had in our employ a different union from what we had expected to have, or that we had . . .*

Q. Well, Mr. Baker, you say, had instructions to employ machinists from Lodge 63, didn't he?

A. A. F. of L.; that was specifically mentioned.

Q. You think it turned on the A. F. of L. and not the machinists Lodge 63?

A. It was A. F. of L., Lodge 63, was the information Mr. Baker——

Q. Well, you got machinists from Lodge 63, didn't you?

A. Yes.

Q. And it was formerly an affiliate of A. F. of L.; isn't that correct?

A. I understand, but not then. That was the cause of the trouble." (R. 111).

It is, therefore, undisputed in this case that the reason for the discharge of these men was not because of any alleged coercion on the part of the Building Trades Council or the local Millwrights' Union, but because of the fact that the company had made a mistake and had hired men from the wrong union. In other words, the company had made an honest mistake and did not know that Machinists Local 63 had left the A. F. of L. some two years prior and when the mistake was called to their attention, they immediately lived up to the contract executed on their behalf by Lautermilch.

The evidence further shows that even after Manash had had conversations with Eggleston of St. Johns on a Thursday and Friday, which would be August 29th and 30th, 1947, St. Johns still continued to hire more machinists on Tuesday, September 2, 1947. On that date—namely, Tuesday, September 2, 1947, St. Johns hired two more machinists from the Machinists Hiring Hall (R. 92-94). Therefore, any suggestions of coercion are completely out of the case for the reason that St. Johns proceeded to hire two more machinists after their conversations with Manash.

III.

The machinists were not entitled to any relief— Unclean Hands Doctrine.

1. The machinists were employed by means of the hiring hall in violation of the Taft-Hartley Act.

The record shows beyond a doubt that only members of machinists' Local No. 63 were dispatched from the hiring hall unless the particular work could not be performed by one of its members. The six machinists whom the Board directed these respondents and the respondent companies to make whole were called by the Union hall and told to report to the Union office and receive clearance slips before going to work. The employer expected to get members of Local 63 and only its members. We submit that the six machinists secured their employment by means of the "hiring hall". The hiring hall has been condemned by the petitioners and by the Court in the case of *N.L.R.B. vs. National Maritime Union of America,* 175 Fed. (2d) 686, 689-90. The petitioners have contended that the doctrine of "Unclean Hands" is not available in this type of proceeding. We agree that ordinarily this is true. The Act seeks to promote harmony in employer-employee relationships, and regardless of the individuals' rights, the over-all picture of labor relations is looked upon and not the result to any one employer or any one Union. However, these respondents, by their answer to the petitioners' petition for enforcement order, have properly raised the question of whether or not the policies of the National Labor

Relations Act would be effectuated by the exercise of the Board's jurisdiction and that such finding is not supported by substantial evidence.

This was the basis upon which the Board was reversed in ordering reinstatement of employees who had gone on an unlawful strike against their employer. See *Southern Steamship Co. vs. N.L.R.B.,* 316 U.S. 31, 47-49. *N.L.R.B. vs. Fansteel Metallurgical Corp.,* 306 U.S. 240, 256-258.

While the writers of this brief do not wish to be in the position of approving the decision of the National Maritime Union case, Supra, nevertheless we find the petitioners seeking to get these respondents to contribute back pay to employees who achieved their status in direct violation of the decisions construing the Act. We, therefore, urge that that portion of the petition seeking an Order directing these respondents and the respondent companies to make whole the six machinists be denied.

IV.

The petition seeking an Order directing the posting of notices is moot.

1. The machinists are again members of the A. F. of L.

The International Association of Machinists on January 1, 1951 again became affiliated with the American Federation of Labor. This occurred subsequent to the filing of the petitioners' petition for the enforcement order in this Court. We are of the opinion that this Court will take judicial knowledge of this fact.

2. *The project has long since been completed without any work stoppage.*

The record shows that this project has long since been completed and was completed without any work stoppage, strike or boycott. It is, therefore, urged that the posting of the notices as requested by the petitioners would not serve any useful purpose nor would it even tend to promote harmony in employer-employee relationship. We urge that in view of the facts existing at this time, it is more likely to cause dissension rather than cooperation.

CONCLUSION

We believe that we have demonstrated:

1. That the petitioners had no jurisdiction in this proceeding for the reason that none of the activities complained of in any way affected commerce and that even if it can be said that there was an effect on commerce, then that this effect was small, inconsequential and that the project was essentially local in nature.

2. That a legal closed-shop contract was entered into with Fry and Volney and that the employment of the machinists was made under their direction and was made through a mistake on their part, and that the discharges were thereby protected by the contract, and that even if there was no contract, that the discharges of the machinists were not made because of any coercion or threats exerted on the employer by these respondents.

3. That the petitioners' petition seeking an enforcement order asking that these respondents make whole the six discharged machinists should be denied for the reason of the "Unclean Hands Doctrine" and that it would not effectuate the purpose of the Act for the Board to enter an Order directing this relief or that the petition seeking an Order directing these respondents to post notices has now become moot, and therefore should be denied.

We respectfully urge that the petitioners' petition seeking an enforcement order should be denied.

Respectfully submitted,

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